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CASE NO. 92-718

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY MORRIS,

Petitioner,

v.

LAWRENCE HILL,

Respondent.

On Petition For a Writ of Certiorari From The United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY BRIEF

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REPLY ARGUMENTS

I. INTRODUCTION

In his Brief In Opposition, ("Brief"), Mr. Lawrence Hill ("Hill"), elects not to address the two issues raised in Mr. Terry Morris's Petition For Writ Of Certiorari ("Petition"). Instead, Mr. Hill identifies and discusses two other issues, which are ancillary to the core issues raised in Mr. Morris's Petition. Confronted with this unorthodox response, it is necessary to address the two issues Mr. Hill raises.

II. PRINCIPLES OF LAW

Understanding of the two issues raised by Mr. Hill is enhanced if there is a recognition that his arguments, although not specifically mentioned in his Brief, are based primarily on two separate and distinct substantive state tort law claims.

"Fear of contracting a future disease" is the first state tort claim which Hill discusses.[1] The standard of proof that most courts require in this type of claim is that the plaintiff prove that he has suffered mental anguish from the reasonable fear that his existing injury will lead to the manifestation of a future disease. In establishing reasonableness, plaintiff need not prove with a high degree of likelihood that the feared potential disease will actually manifest itself. *See Sterling v. Velsicol,* 855 F.2d 1188, 1205-07 (6th Cir. 1988) (applying Tennessee law); *Wetherhill v. University of Chicago,* 565 F. Supp. 1553, 1559-61 (N.D. Ill. 1983) (applying Illinois law).

"Increased risk of developing a future disease" is the second state tort claim which Hill discusses.[2] The standard

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[1] Hill claims that severe emotional distress is a cognizable injury under the Eighth Amendment. Brief at 7-8.

[2] Hill claims that his loss of chance to reduce his risk of developing tuberculosis is a cognizable injury under the Eighth Amendment. Brief at 8-13. This assertion is really an increased risk of future harm claim couched in terms of loss of chance claim.

of proof that most courts require in this type of claim is that plaintiff prove that he has an existing injury and that he also prove with reasonable medical certainty (greater than fifty percent) that the predicted future disease will actually manifest itself. *See Sterling v. Velsicol Chemical Corp.*, 855 F.2d at 1204-05 (applying Tennessee law); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982) (applying District of Columbia law); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 412 (5th Cir.) (applying Mississippi law), *cert. denied*, 478 U.S. 1022 (1986).

III. THE FEAR OF CONTRACTING A FUTURE DISEASE IS NOT A COGNIZABLE HARM FOR THE PURPOSE OF ESTABLISHING AN EIGHTH AMENDMENT DEPRIVATION OF MEDICAL CARE CLAIM.

In his Brief (at 7-8), Mr. Hill claims that serious emotional distress (fear of contracting a future disease) is a cognizable injury under the Eighth Amendment. First, it must be noted that Mr. Hill's theory of recovery in the trial court was not predicated on this state substantive law claim.[3] Second, based on Mr. Hill's actual risk factor (ranging from twenty-three percent to a fraction of one percent) of developing tuberculosis, Mr. Hill did not establish the reasonableness

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[3] Prior to the commencement of the trial, the trial court granted Mr. Morris's motion *in limine*, prohibiting Mr. Hill from introducing at trial any evidence on fear of developing a future disease claim, and any evidence on increased risk of harm for developing a future disease claim for the specific purpose of predicating recovery on the bases of these two state substantive law claims. The trial court also ruled that Mr. Hill could introduce such evidence (fear and risk) for the purpose of establishing mental anguish as an element of compensatory damages accompanying an existing injury. Following oral argument, the trial court instructed the jury on the standard elements of compensatory damages. Those elements included mental anguish and emotional distress. The trial court's rulings are in conformity with this Court's decisions in *Carey v. Piphus*, 435 U.S. 247, 264 (1978) and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986), and also in conformity with the Sixth Circuit's decision in *Parrish v. Johnson*, 800 F.2d 600, 611 (6th Cir. 1986).

of his fear. Hence, he has failed to establish a cognizable fear of contracting a future disease claim. Third, there isn't any sensible reason to elevate this substantive state tort to the level of a constitutional tort.

IV. AN INCREASED RISK OF DEVELOPING A FUTURE DISEASE IS NOT A COGNIZABLE HARM FOR THE PURPOSE OF ESTABLISHING AN EIGHTH AMENDMENT DEPRIVATION OF MEDICAL CARE CLAIM.

In his Brief (at 8-13), Mr. Hill claims that being deprived of an opportunity to reduce his risk of developing tuberculosis by up to ninety percent through the use of isoniazid ("INH") is a cognizable harm under the Eighth Amendment. This assertion is really an increased risk of developing a future harm claim couched in terms of a loss of chance claim. First, it must be noted that Mr. Hill's theory of recovery in the trial court was not predicated on this state substantive law claim. Second, the direct consequence of the deprivation is not an actual injury. Instead, the direct consequence of the deprivation is that Mr. Hill's risk of developing tuberculosis may be greater.[4] Thus, his increased risk is still a potential injury, not an actual injury.[5] Third, Mr. Hill has failed to demonstrate with reasonable medical certainty (greater than fifty percent) that he will develop tuberculosis in the future.[6] As a consequence, he has failed

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[4] The record indicates otherwise, indeed, "[i]f Mr. Hill did not, in fact, receive his INH, his risk would remain exactly the same." *See* Petition at 10.

[5] The Sixth Circuit erroneously concluded that: "Hill has suffered an actual injury, in that he was prevented by Mr. Morris's indifference to his medical needs from reducing his risk of developing tuberculosis by ninety percent." *Hill v. Marshall,* 962 F.2d 1209, 1215 (6th Cir. 1992) (A1).

[6] The Sixth Circuit erroneously concluded that: "Hill did not have to show more than a 50% risk of developing tuberculosis, only that his risk has increased due to the deprivation." *Hill v. Marshall,* 962 F.2d at 1214 (A-1). The Sixth Circuit's reliance on the case of *Clark v. Taylor,* 710 F.2d 4 (1st Cir. 1983) is misplaced. Id. at A-9. In *Clark,* the prison

to establish a cognizable increase of risk of future harm claim. Fourth, there isn't any sensible reason to elevate this substantive state tort to the level of a constitutional tort.

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[5] *Footnote 6 cont.*
inmate sought damages for his fear of developing cancer, not for any increased risk of cancer. The First Circuit affirmed the award of $60,000 in compensatory damages because it found that the inmate's fear of developing cancer was genuine.

CONCLUSION

The trial record discloses that this case was not tried as a fear of contracting a future disease claim, nor as a mere increased risk of developing a future disease claim. On appeal, however, the Sixth Circuit elevated a substantive state tort claim (mere increased risk of injury claim) to a cognizable constitutional tort action. The core issues involved in this case are identified and discussed in Mr. Morris's Petition. This court must decide these important constitutional issues now.

Petitioner submits that a writ of certiorari should therefore be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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